Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

vs.

WILLIAM P. HAVRISH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Through an order of protection, Havrish was ordered to surrender all firearms owned or in his possession. Havrish then turned in an illegal handgun. The Fifth Amendment guarantees that individuals cannot be compelled to be a witness against themselves. But this principle only extends to matters of a testimonial or communicative nature – not non-testimonial tangible physical evidence which is incriminating. Since Havrish was not compelled to produce anything testimonial or communicative, did the New York Court of Appeals incorrectly determine that a violation of the Fifth Amendment occurred?

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The opinion of the New York State Court of Appeals – the highest state court to review the merits of this case – appears in the Appendix to the petition, at 1a, and is unpublished. The Decision and Order of the Schoharie County Court appears in the Appendix at 11a.

JURISDICTION

The date when the Court of Appeals decided this case was April 3, 2007. This petition for certiorari is filed within ninety days of that decision, and is therefore timely. Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ***nor shall be compelled in any criminal case to be a witness against himself***, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public

use, without just compensation *(emphasis supplied)*.

STATEMENT OF THE CASE

Facts

On April 8, 2005, the appellant, William Havrish, was arrested and issued an Order of Protection out of the Delhi Town Court (Delaware County, New York) for charges that included Burglary and Kidnapping. Under the terms of that Order of Protection, Havrish was ordered to "Surrender any and all firearms owned or possessed. . .."

Subsequently, Havrish posted bail the same morning and then allowed deputies to come to his home in Jefferson, (Schoharie County) New York to surrender his long guns. Havrish also told deputies that he had given a pistol to his former wife, Linda Havrish who was not the subject of the Town Court's Order of Protection. Based on that information, Deputy Joseph A. Andreno interviewed Linda Havrish later that day. Linda explained that she did not have the pistol and added that her husband did not have a license for it.

Eventually, Deputy Andreno received a telephone message that William Havrish had called, and claimed that he had found the pistol. Deputy Andreno then responded to Havrish's residence in Jefferson and secured the pistol – a Ruger .44 Magnum Blackhawk revolver. While Andreno was writing out a receipt for the handgun, Havrish inquired whether or not he would need a permit to get the pistol back. Andreno did not reply.

Ultimately, Havrish was charged in the Jefferson Town Court with Criminal Possession of a Weapon in the Fourth Degree (New York Penal Law §265.01[1] – a class A misdemeanor) for possessing the handgun without a valid license. After arraignment, Havrish moved to dismiss the case claiming that his Fifth Amendment right against self-incrimination had been violated because he was forced to turn over the illegal handgun and that his Fourth Amendment rights had been violated.

Procedural History

On January 25, 2006, the Jefferson Town Court (Hait, J.) granted the defendant's motion to dismiss on these grounds and also suppressed the evidence consisting of the handgun and statements made to police.

The People took an appeal to the Schoharie County Court (Bartlett, J.). By decision and order dated June 8, 2006, County Court reversed Town Court's order finding that no Fourth or Fifth Amendment violation occurred and reinstated the accusatory instrument (11a).

Havrish was granted leave to appeal to the New York State Court of Appeals on September 14, 2006. On February 8, 2007, the New York State Court of Appeals heard cral argument on the issue of whether Havrish's surrender of the handgun was privileged under the Fifth Amendment. By Decision and Order dated April 3, 2007, it found that it was privileged and, accordingly, reversed County Court's order and granted Havrish's motion to suppress and dismiss the accusatory instrument (1a).

REASONS FOR GRANTING THE WRIT

This case presents a single compelling issue for this Court's consideration – one that goes to the heart of the Fifth Amendment. Indeed, this case represents an opportunity for this Court to review a case when physical evidence – which is not documentary in nature – has been held to rise to the level of being testimonial or communicative, thus triggering Fifth Amendment Protection based on the act of production doctrine.

This Court has held as constitutional, a defendant's compelled production of the following physical evidence even though that evidence led to prosecution and conviction: to give a blood sample (*Schmerber v. California*, 384 U.S. 757, 765 (1966)); to stand in a lineup (*United States v. Wade*, 388 U.S. 218, 221(1967)); to wear particular clothing (*Holt v. United States*, 218 U.S. 245, 252 (1910)); and to provide a handwriting exemplar, (*Gilbert v. California* 388 U.S. 266, 266 (1951)). In the case below, the Court of Appeals relied upon to the act of production doctrine when it determined that Havrish's surrender of the handgun was "sufficiently incriminating to give rise to Fifth Amendment protection." In *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990), this Court held that when the government demands the production of an item, " the only thing compelled is the act of producing the item." Id. at 554-555.

Historically, the act of production doctrine has only been applied to the surrender of subpoenaed documents. But in *Bouknight*, this Court suggested that it can also apply to the compelled production of other types of evidence. Even more recently in *United States v. Patane*, 542 U.S. 630, 644 n7 (2004), this Court touched on the scope of the self-incrimination clause and proposed that it ***was*** possible to use

legal process to compel a defendant to produce physical evidence [a handgun].

The facts of this case are well-suited to serve as a vehicle for this Court to clarify not only the scope of the self incrimination clause, but also the act of production doctrine.

CONCLUSION

This Court should grant certiorari to determine whether the act of surrendering a handgun has certain testimonial or communicative aspects that is privileged under the Fifth Amendment.

Respectfully submitted,

JAMES SACKETT
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Assistant District Attorney

**Counsel of Record for the Petitioner*

July 2, 2007

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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

-against-

WILLIAM P. HAVRISH,

Appellant.

Argued February 8, 2007 Decided April 3, 2007

COUNSEL: Patrick J.Cannon, for appellant.

Thomas F. Garner, for respondent.

JUDGES: Opinion by Judge V.A.Graffeo, Chief Judge Kaye, and Judges Ciparick, Read, R.S.Smith, and Pigott. Judge T.Jones took no part.

GRAFFEO, J.:

In complying with an order of protection that directed him to turn over his firearms to police, defendant produced an unlicensed handgun and was subsequently charged with criminal possession of a weapon in the fourth degree. The issue before us is whether defendant's surrender of the handgun was privileged under the Fifth Amendment. We conclude that is was and therefore reverse the order of County Court, grant

defendant's motion to suppress and dismiss the accusatory instrument.

On April 8, 2005, defendant was charged with Delhi Town Court with assault in the third degree, burglary in the second degree, and kidnapping in the second degree in connection with a domestic violence incident in Delaware County. The Town Court set bail and issued an order of protection directing defendant to stay away from the victim and to "surrender any and all firearms owned and possessed."

After defendant posted bail, the police accompanied him to his residence in Schoharie County where defendant promptly gave the officers his "long guns." Defendant advised the authorities that he owned and handgun but had given it to his ex-wife. The police contacted defendant's ex-wife, who informed them that she did not possess the pistol, but believed defendant still had it. She claimed to have last seen the gun in a small room off the living room in defendant's home. With some equivocation, she also indicated that the handgun was not licensed.

Before the authorities acted on the information supplied by defendant's ex-wife, defendant called one of the officers and said that he had located the pistol. When the police arrived at his home, defendant brought them to a small room next to the living room, where they retrieved a Ruger Blackhawk .44 magnum revolved from a milk crate.

Once the police confirmed that defendant did not have a license for the handgun, defendant was charged in Jefferson Town Court with criminal possession of a weapon in the fourth degree, a class A misdemeanor. He moved to dismiss the accusatory instrument on the ground that the gun and his statements to police must be suppressed because he was

compelled to produce evidence protected by the Fifth Amendment right against self-incrimination. Defense counsel argued that the order directing defendant to turn over his weapons created an impossible dilemma, since defendant was required either to produce the unlicensed pistol, thereby incriminating himself, or defy the court order and risk being prosecuted for criminal contempt. Among other arguments, the People countered that defendant's Fifth Amendment rights were not implicated because surrender of the revolver involved production of physical evidence that was not communicative or testimonial in nature.[1]

Jefferson Town Court granted defendant's motion to suppress, concluding that for purposes of the weapon possession prosecution, defendant's surrender of the pistol was privileged under the Fifth Amendment. Because the People did not assert that they possessed independent evidence of defendant's guilt, the court determined that dismissal of the accusatory instrument was also warranted. On the People's appeal, County Court reversed and reinstated the charge, reasoning that the order directing defendant to surrender the handgun involved the production of real or physical evidence, not compelled communication, and therefore did not run afoul of the Fifth Amendment. A Judge of this Court granted defendant leave to appeal and we now reverse.

The Fifth Amendment guarantees that an individual shall "not be compelled in any criminal case to be a witness against himself" (U.S. Const. 5th Amend). "[T]he privilege protects an accused . . . from being compelled to testify against

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[1]The People also contended that defendant could not seek suppression based on the Fifth Amendment because he did not invoke the privilege before he turned over the weapon. See, e.g. Roberts v. United States, 445 U.S. 552, 559-561 [1980]). The People having failed to brief this argument on appeal, we have no occasion to consider it.

himself, or otherwise provide the State with evidence of a testimonial or communicative nature" (Schmerber v. California, 384 U.S. 757, 761 [1966]). There are thus two elements to the privilege: the presence of compulsion and the solicitation or receipt by the government of evidence of a testimonial nature.

Here, the element of state compulsion was unquestionably met. Defendant was ordered by a court to surrender his weapons. Had he failed to do so, he could have been prosecuted for criminal contempt. The more difficult question is whether compliance with the order supplied testimonial or communicative evidence or whether, as County Court concluded, defendant was merely directed to supply "real or physical evidence" not protected by the Fifth Amendment.

It is well settled that a person can be forced to produce real or physical evidence without offending the privilege against self-incrimination (id.). Cases in which a defendant is required to engage in conduct that reveals the physical characteristics of his or her body generally fall in the "real or physical evidence" category. For example, in Schmerber, the Court held that the requirement that a defendant accused of driving while intoxicated submit to a blood test did not implicate the Fifth Amendment privilege because defendant's "testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis, and on that alone" (id. at 765).

The Fifth Amendment therefore "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume the stance, to walk, or to make a particular gesture" (id. at 764). Similarly, a defendant can be ordered to participate in a lineup (see United States v. Wade, 388 U.S. 218 [1967]) or to provide a handwritten exemplar (see

Gilbert v. California, 388 U.S. 263 [1967]) without implicating the privilege against self-incrimination. Our Court has applied the Schmerber on a number of occasions, holding that field sobriety tests conducted during a traffic stop were the equivalent of real or physical evidence not protected under the Fifth Amendment (People v. Hager, 69 N.Y.2d 141 [1987]; see People v. Bert, 92 N.Y.2d 701 [1999]) and that a defendant could not rely on the privilege to avoid compliance with a court order requiring him to display his upper body tattoos (see People v. Slavin, 1 N.Y.3d 392, cert. denied 543 U.S. 818 [2004]).

The People rely on the Schmerber analysis in asserting that defendant's surrender of the revolver was not conduct protected by the Fifth Amendment. But the surrender of evidence – even evidence not otherwise cloaked by privilege – may itself be privileged if the very act of production has communicative or testimonial aspects (see United States v. Doe, 465 U.S. 605, 613 [1984]["Doe I"]). Although the act of production has most commonly been applied to the surrender of subpoenaed documents, the U.S. Supreme Court has indicated that it can also apply to the compelled production of other types of evidence (see Baltimore City Dept. of Social Servs. v. Bouknight, 493 U.S. 549 [1990]; but see United States v. Patane, 542 U.S. 630, 644 n7 [2004]). And the Court has emphasized that the item produced is distinct from the act of production itself. In sum, even when the thing demanded is not privileged, the act of production may be (see Doe I, 465 U.S. 613).[2]

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[2] For example, in the case of a document, the contents are not deemed to have been compelled if the document was prepared voluntarily. Even if the contents of the document are not cloaked with the privilege because the element of compulsion is absent, the doctrine may apply to privilege the act of producing the document (Doe I, 465 U.S. at 617 n17; see Fisher v. United States, 425 U.S. 391, 409-410 [1976]). Similarly, in Bouknight, where the

In Bouknight, the judge presiding over a child-protective proceeding ordered a mother to produce her child in court. She refused, invoking the Fifth Amendment. In considering whether the mother could rely on the act of production doctrine to avoid compliance with the court order, the Court explained the doctrine as follows:

> "When the government demands that an item be produced, the only thing compelled is the act of producing the item . . . The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession or authenticity of the things produced" (493 U.S. at 554-555 [internal quotations, citations and brackets omitted]; see United States v. Hubbell, 530 U.S. 27, 36[2000]).

Ultimately, the Court held the doctrine inapplicable to the mother's circumstance, because it could not be used to resist compliance with a civil regulatory regime constructed to effectuate governmental purposes unrelated to law enforcement

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Supreme Court considered whether a mother could invoke the privilege in order to avoid producing her child for a court proceeding, the Court noted that, if the doctrine applied, the baby itself was not privileged and the mother could not "claim the privilege based upon anything that examination of [the child] might reveal" (493 U.S. at 555). Instead, the privilege would apply to the mother's conduct. Thus, the fact that the item to be produced is "real or physical evidence" not protected under the privilege does not automatically preclude application of the act of production doctrine.

– the social services system designed for the protection of children.

In this case, the People did not assert below, and do not argue here, that the Bouknight regulatory regime applies to this factual scenario.[3] Thus, the pivotal issue here is whether defendant's act of producing the unlicensed handgun was privileged. The Supreme Court has developed a two-part test for resolving this question (see Fisher v. United States, 425 U.S. 391 [1976]).

First, a court must assess whether the compelled act of production is sufficiently testimonial. Under the Fifth Amendment, evidence is deemed testimonial when it reveals defendant's subjective knowledge or thought process – when it expresses the contents of defendant's mind (Doe v. United States, 487 U.S. 201, 211 [1988]["Doe II"]; Hager, 69 N.Y.2d at 142). The surrender of evidence can be testimonial if, by doing so, defendant tacitly concedes that the item demanded exists or is in defendant's possession or control when these facts are unknown to the authorities and would not have been discovered through independent means. But another way, the inquiry is whether the existence of the item sought, or defendant's possession of it, was a "foregone conclusion and the [defendant] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the

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[3] Any argument concerning the applicability of the regulatory regime exception is both unpreserved and waived. Moreover, even if the exception applied, it is not clear to what extent it would assist the People. In Bouknight, the Supreme Court did not define the limitations on the use of testimonial evidence obtained by virtue of the regulatory regime exception but noted in dicta that "the Fifth Amendment protections are not . . . necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution" (493 U.S. at 561, 562).

item" (Fisher, 425 U.S. at 411). In that circumstance, the act of production is not sufficiently testimonial to implicate the Fifth Amendment.

Second, a court must determine whether the act of production is incriminating. If the subjective information the Government will obtain through the act of production does not "pose [ ] any realistic threat of incrimination" (id. at 412) but presents "merely trifling or imaginary hazards of incrimination" (Doe I, 465 U.S. at 614 n13 [internal citations and quotations omitted]), the act enjoys no Fifth Amendment protection. Both elements must be fulfilled for an act of production to be privileged and the Supreme Court has made clear that the elements "do not lend themselves to categorical answers: their resolution . . . instead depend[s] on the facts and circumstances of particular cases" (Fisher, 425 U.S. at 410).

Turning to the first inquiry, in this case, we cannot say, absent defendant's court-ordered surrender of the revolver, the discovery that defendant possessed an unlicensed handgun would have been a "foregone conclusion." Before defendant revealed that he had possessed a revolver, neither the court nor the police were aware that defendant owned a handgun. Further more, defendant's statements about the gun were integral to compliance with the directive in the order of protection. Although it is conceivable that defendant could have heeded the order without uttering a word about his weapons, it was reasonably likely that defendant's response would include verbal communications concerning their existence and location. The statements defendant made – advising police that he owned a revolver and indicating where it was - went no further than what a person complying with such an order would have been expected to communicate. They were therefore central to and part of the act of production. And that act was the

exclusive source of evidence the People relied on in pursuing the prosecution for criminal possession of a weapon.

The People have not come forward with evidence, suggesting that, incident to the charges in the domestic violence case, they were independently investigating whether defendant owned a handgun. It is true that defendant's ex-wife disclosed information to the authorities concerning the unlicensed revolved, but there is no basis in the record to conclude that the police would have contacted her if defendant had not earlier indicated that she had the gun.[4] Nor have the People proffered evidence that the victim of the domestic violence incident knew of the pistol or that, in the ordinary course of investigation of that incident, she would have necessarily alerted them to defendant's unlawful possession of it. Had this information been provided, the police may well have been able to obtain the weapon through execution of a search warrant. But, on this record, defendant's surrender of the gun was testimonial because it revealed defendant's subjective thought processes – that he knowingly possessed the weapon – and, absent this revelation, the information would not have come to the attention of the police.

Defendant's surrender of the handgun was also sufficiently incriminating to give rise to Fifth Amendment protection. The order compelling defendant to turn over his weapons was issued in the course of a felony prosecution without a grant of immunity or amnesty. Indeed, by the time defendant produced the weapon, he had provided the police with proof of virtually every element of the offense of criminal possession of a weapon. Given that the act of production

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[4] There was no connection between the ex-wife and the domestic violence incident in Delaware County, which involved a different person. It appears that the authorities would have had no reason to interview defendant's ex-wife concerning their investigation of the Delaware County charges.

involved the commission of a crime in the presence of police, it can hardly be argued that the conduct was unlikely to result in criminal prosecution.

Both elements of the act of production having been met, defendant's surrender of the unlicensed handgun was privileged under the Fifth Amendment and suppression of the evidence was therefore warranted in the weapons possession prosecution. Because the People have proffered no evidence that law enforcement authorities would have learned of defendant's possession of the revolved through independent means, or that they could have connected defendant to the handgun with proof unrelated to the act of production, the suppression of this evidence necessitated dismissal of the accusatory instrument.

Accordingly, the order of County Court should be reversed, defendant's motion to suppress granted, and the information dismissed.

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SCHOHARIE

THE PEOPLE OF THE STATE OF
NEW YORK,

-against-

WILLIAM P. HAVRISH,

Defendant.

Decided and Entered June 8, 2006

COUNSEL: James Sackett, Schoharie County District Attorney (Thomas F. Garner, Assistant District Attorney of counsel), for the People

Patrick J. Cannon, for defendant.

JUDGE: George R. Bartlett, III, J.C.C.

Background

The People appeal from the Decision and Order of the Town of Jefferson Justice Court (the Hon. Lynn Hait, J.), dated January 25, 2006 and entered February 8, 2006, dismissing the accusatory instrument charging defendant with the crime of Criminal Possession of Weapon in the Fourth Degree, a Class A misdemeanor, in violation of Penal Law §265.01[1] and suppressing certain evidence, more particularly, "the weapon

[defendant] was alleged to have possessed and statements made to the police in connection with his possession of that weapon."

The People contend that the trial court erred in suppressing the evidence and dismissing the accusatory instruments on the grounds of the violation of defendant's Fourth Amendment protections against unlawful searches and seizures and Fifth Amendment protections against governmentally compelled self-incrimination.

Discussion

The facts surrounding this matter are not in dispute. The record provided to this Court by appellate counsel provided the opportunity for meaningful appellate review. On or about April 8, 2005, defendant surrendered his weapons, including his unlicensed handgun, to the Delaware County Sheriff pursuant to a lawful court order; he was not subjected to any search or seizure of constitutional dimension. Moreover, since both defendant and his wife both independently and voluntarily advised the police of the handguns' existence and its location, the police would have inevitably discovered it anyway.

Turning to the People's contention that Town Court incorrectly found a violation of defendant's right against self-incrimination, contrary to Judge Hait's determination, to the extent, if any, that defendant was compelled to turn over his handgun, it is now well settled that "a person can be forced to produce real or physical evidence without his or her Fifth amendment rights (see, People v. Berg, 92 N.Y.2d 701, 704, quoting Schmerber v. California, 384 U.S. at 764; see also, People v. Slavin, 1 N.Y.3d 392, cert. denied, 543 U.S. 818).

As the United States Supreme Court explained, "there is a significant difference between the use of compulsion to extort

communication from a defendant in compelling a person to engage in conduct that may be incriminating" (see, U. S. v. Hubbell, 530 U.S. 27 at 34-35). In the latter situation, the privilege is not violated because "the prohibition of compelling a man to be witness against himself is a prohibition of the use of . . . compulsion to extort communications from him, not in exclusion of evidence when it may be material "(id. at 35 n9, quoting Holt v. United States, 218 U.S. 245, 252-253). "The privilege does not excuse compliance with a governmental demand for the production of something, and 'a person may not claim the Fifth Amendment's protections based upon incrimination that may result from the nature of the thing demanded'" (see, Prince Richardson on Evidence [11th Edition, Farrell] §5-702, quoting Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549, 555).

Accordingly, it is **ORDERED AND ADJUDGED**, that the decision of the Town of Jefferson Justice Court, dated January 25, 2006, and entered February 8, 2006, dismissing the accusatory instrument and suppressing the introduction at trial of certain physical evidence and defendant's statements made with respect thereto be and hereby is reversed and the order vacated; and the accusatory instrument reinstated; and it is **FURTHER ORDERED AND ADJUDGED**, that this matter is remitted to the Town of Jefferson Justice Court for further proceedings consistent with the foregoing decision and order.